

IN THE MATTER OF : BEFORE THE  
**DANA MCGREGOR** : HOWARD COUNTY  
Petitioner : BOARD OF APPEALS  
: HEARING EXAMINER  
: BA Case No. 12-009C&V

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**DECISION AND ORDER**

On July 2, 2012, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the conditional use petition of Dana McGregor (Petitioner) for a Day Care Child Center with up to 30 children pursuant to Section 131.N.13 of the Howard County Zoning Regulations (the "Zoning Regulations"). Petitioner is also seeking variances to reduce the 20-foot use setback from lot lines to approximately 1) ten feet for a playground and shed (west lot line), 2) six feet for a concrete walk and bike path (rear lot line), 3) two feet three inches for a van parking and trash can storage area (east lot line), and 4) seven feet for a parking circulation area (east lot line) pursuant to Section 108.D.4.c.(2).

The Petitioner certified to compliance with the advertising and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

The Petitioner was not represented by counsel. Dana McGregor and Dan Murphy testified in support of the petition. Kathy Fitzpatrick and Priscilla Bradyhouse testified in opposition to the petition.

A Preliminary Matter

At the outset of the hearing, Petitioner introduced into evidence Petitioner's Exhibit 1, a revised Conditional Use Plan. Dan Murphy explained he revised the plan to address Technical Staff Report issues, which recommended denial, in part, due to the need for multiple variances. The revised plan proposes an 8'x15' storage/maintenance shed to be located about 10 feet from the west lot line. The playground and bike path is redesigned such that they do not encroach into the rear setback. A van parking and trashcan storage area are located about two-feet three inches from the east lot line. A parking circulation area is located about seven feet from the east lot. A residential parking space would be located in front of the van parking area, and seven parking spaces are shown perpendicular to the front of the house. Two employee parking spaces are depicted to the east and south of these spaces.

Because the amended plan is not substantive, the Hearing Examiner determined it could be introduced into evidence in accordance with Hearing Examiner Rules 9.4 and 9.5.<sup>1</sup> Accordingly, the term "Second Amended Plan" referenced in this decision and order refers to the May 2012 plans.<sup>2</sup>

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<sup>1</sup> Under Rule 9.4, when a petitioner proposes to amend a petition during the course of the proceedings, the petitioner must submit the amendment as an exhibit. Rule 9.5. requires the hearing examiner to suspend the hearing for at least three weeks if the amendment is substantive, i.e., the amendment proposes a use that is likely to impact vicinal properties adversely.

<sup>2</sup> The Technical Staff Report references an "Amended Plan, which Petitioner submitted, apparently, with a variance petition when informed the proposed use would need variances.

**FINDINGS OF FACT**

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds the following facts:

1. Property Identification. The subject property is located in the 2<sup>nd</sup> Election District on the north side of Old Frederick Road about 370 feet west of Mt. Hebron Drive. It is referenced as Tax Map 29, Grid 10, Parcel 280, Lot 8, and is also known as 9210 Old Frederick Road (MD 99) (the "Property"). The Property is Lot 8 of the Mt. Hebron Section 1 subdivision,

2. Property Description. The 21,954 square-foot, generally rectangular Property is improved with a one-story brick single-family detached dwelling and basement constructed in the late 1950s. The house is set back farther from MD 99 than the current 50-foot minimum and the rear of the house is about 36 feet from the rear lot. The driveway entrance is located in the southeast corner. Play equipment and a shed are located to the west and northwest of the house. Evergreen tree buffers run along the Property's rear and front lot lines and deciduous trees dot the yard. Hedges run along portions of the west lot line. The Property is highest in the northeast corner and from here, the elevation drops about seven feet to the southwest corner.

3. Vicinal Properties. Adjacent properties are zoned R-20. To the north, Lot 21 of the Mt. Hebron Section 3 is improved with a single-family detached dwelling fronting on Furrow Avenue. To the east are Lots 7 and 9 of the Mt. Hebron Section I subdivision and these are each improved with a single-family detached dwelling fronting on and with access to MD 99.

4. Roads. MD 99 in this location had one eastbound travel lane, one westbound travel

lane, a center left-hand turn lane and about 48 feet of paving within a variable width right-of-way (ROW). The estimated sight distance from the existing driveway entrance is more than 500 feet to the east and west. According to State Highway Administration (SHA) data, the traffic volume on MD 99 west of US 29 was 15,201 average daily trips as of 2010.

5. Water and Sewer Service. The Property will be served by public water and sewer.

6. General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as a "Residential Area" land use. Transportation Map 2000-2020 of the 2000 General Plan depicts MD 99 as a Minor Arterial.

7. The Proposal. Petitioner currently provides home care for up to seven children and now proposes to operate a full child day care center and pre-school on the Property (the Day Care Use.) Up to 30 children will attend the Day Care Use. The proposed hours of operation are from 6:00 a.m. to 6:30 p.m. Monday through Friday. The building is a residence and will continue to be occupied by four resident occupants (Ms. McGregor and her children). The Day Care Use would employ two persons.

According to the Second Amended Plan, Petitioner is proposing a 25-foot wide driveway into the Property in the same general area as the existing driveway. This driveway leads to a small parking area in front of the building. Seven Day Care Use parking spaces face the building. To the west and south are two employee spaces facing the west lot line. One residential parking space is depicted to the east of the seven Day Care Use spaces and this parking space fronts a van parking space on the building's east side. The residential and van spaces, as well as the trashcan storage area, are located within the 20-foot use setback, about as 2'3' from the

east lot line. A six-foot privacy fence would run along the side lot lines next to and behind the building, and along the rear lot line.

In the west and rear yards, Petitioner is proposing a playground area with a play set and wood chip surface, a concrete walk and bike path loop, with additional sidewalks extending to east, rear and west sides of the building. A portion of the easternmost walk is located within the 20-foot use setback from the east lot line. An 8'x15' (110-sq. ft.) new maintenance/storage shed is depicted in the rear, northwest corner of the Property and it is located within the 20-foot use setback. Existing evergreen trees along the Property's front and rear will be retained, as will several large trees throughout the yard. New landscaping is depicted along the east lot line, and is intended, apparently, to buffer the use.

8. Dan Murphy testified that he designed the Second Amended Plan, and all plans, to use the existing driveway. The Second Amended Plan was designed to eliminate the need for variances.

9. Ms. McGregor testified that she could organize outdoor play toward the west side of the Property to lessen noise. Dan Murphy did not know the distance of adjoining residences from the Property.

10. Ms. McGregor explained that the dwelling is 1,500 sq. ft. and includes a basement, which would not be part of the Day Care Use. Ms. McGregor lives in the rear portion of the first floor.

11. Mr. Murphy testified the shed depicted on the Second Amended Plan would be used for residential purposes. The Hearing Examiner noted the Amended Plan included a note

stating a shed in the same location would be used for play equipment storage. When asked where this equipment would now be stored, Mr. Murphy said it would be stored in the basement.

12. During cross-examination by Ms. Fitzpatrick, who also lives in a 1,500-square foot house, about how the use could be operate within the first floor of the small dwelling. Ms. McGregor explained that the Day Care Use may not initially serve 30 children, but she wanted to be able to expand without submitting a petition to modify/expand the use. She also explained a state agency would approve the number of attendees permitted based on floor space, with 35-square feet required for each child. She believes the Day Care Use can accommodate 30 children and meet state spacing requirements. Three front rooms would be used as classrooms: the dining room, the former garage, the dining room and the living room.

13. Ms. Fitzpatrick expressed concern about the intensity of the use.

### **CONCLUSIONS OF LAW**

#### **Background Issues**

Explaining the Second Amended Plan, Mr. Murphy stated the revisions were such that no variances would be required for the Day Care Use. However, the van parking area, the trash area, a portion of the concrete walk, bike path and parking circulation area, as well as part of the building to be used as part of the Day Care Use are located within the 20-foot use setback from the east lot line. Variances are required for these uses, as well as for the residential parking space.

Moreover, the proposed 8'x15' storage and maintenance shed would be located about ten feet from the west lot line. Zoning Regulations Section 128.A.1.e exempts sheds from side and rear setbacks if the shed's lot coverage does not exceed a cumulative total of 100 square feet. The proposed shed is 120-square feet; consequently, a variance from the 20-foot use setback is required.

Based upon the foregoing Findings of Fact, the Hearing Examiner concludes as follows:

**I. Criteria for Granting a Variance (Section 131.B.2.a)**

The standards for variances are contained in Section 130.B.2.a of the Regulations. Pursuant to this section, I may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria. Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variance complies with Section 130.B.2.a.(1) through (4), and therefore may be granted.

**(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.**

Compliance with this first criterion is a two-part test. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted

purpose or would render conformity with such restrictions unnecessarily burdensome.” Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 28, 322 A.2d 220 (1974).

Assuming the former attached garage was built when the main dwelling was constructed in the late 1950s, it is a lawful nonconforming structure, as the Zoning Regulations did not establish the R-20 zoning district until 1961. When the Mt. Hebron subdivision was developed, the Property was zoned "R" (Residential) under the 1954 Zoning Regulations, as amended. The R district building setbacks were 50 feet from the front lot line, 10 feet from the side lot lines and 50 feet from the rear lot line. There was no use setback requirement.

Ordinarily, existing structures may not be considered "unique" features of a property. In this case, however, the former attached garage is partially situated within the required 20-foot use setback area. As such, it is a noncomplying structure and therefore constitutes a unique physical condition of the Property. This uniqueness notwithstanding, the determinative issue in this case is whether the Property's physical uniqueness causes Petitioner practical difficulty or unnecessary hardship in complying with the 20-foot use setback, considering the line of cases interpreting "practical difficulty" or "unnecessary hardship" as a denial of reasonable use standard. See Belvoir Farms Homeowner Association, Inc. v. North, 355 Md. 259, 734 A.2d 227 (1999) (discussing the interpretation of variance standards). See also Citrano v. North, 123 Md. App. 234, 717 A.2d 960 (1997) (holding board of appeals properly denied variance for a deck accessory structure in a 100-foot critical area, finding no unwarranted hardship where property was already developed with a single family dwelling and related improvements), citing North v.

St. Mary's County, 99 Md.App. 502, 638 A.2d 1175 (1994) ("If reasonable use exists, generally an unwarranted hardship would not.") North v. St. Mary's, 99 Md. App. at 517-18, 638 A.2d 1175.

The Findings of Fact do not establish the existence of an unnecessary hardship or practical difficulty. The difficulty with respect to use of the former attached garage arises from Petitioner's interest in seeking approval for up to 30 children for the proposed Day Care Use. The Property is already improved by an existing dwelling and Petitioner operates a seven-child home care operation. Petitioner also explained that she seeks approval for a Day Care Use for up to 30 children because she did not want to seek approval to expand the use in the future.

With respect to the need for variances to accommodate the shed, sidewalk, bike path, circulation area, van parking area and trashcan storage area, the Hearing Examiner concludes there are no unique physical conditions causing practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations. The Property is similar in size and shape to area properties. The petition does not accord with Section 130.B.2.a.(1).

**(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.**

The Petitioner has not persuaded the Hearing Examiner that the variances, if granted, will not alter the essential character of the neighborhood or district in which the lot is located, will not substantially impair the appropriate use or development of adjacent property, and will not be detrimental to the public welfare. The encroaching uses are primarily outdoor uses

associated with a 30-child Day Care Use. Given the similar size and lot configuration of adjacent properties, and considering that the proposed buffer for the encroaching use is a privacy fence and landscaping, the Hearing Examiner concludes that a Day Care Use serving 30 children at this location will alter the essential character of the neighborhood or district in which the Property is located. The petition does not accord with Section 130.B.2.a.(2).

**(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.**

Petitioner's desire to operate a day-care use for up to 30 children creates the practical difficulties or hardships. The petition does not accord with Section 130.B.2.a.(3).

**(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.**

The proposed encroachments are intended to support the maximum number of children for the proposed day care use. The petition does not accord with Section 130.B.2.a.(4).

## **II. General Criteria for Conditional Uses (Section 131.B)**

**A. Harmony with the General Plan.** Section 131.B.1 requires me to evaluate whether the proposed modification of the approved conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

**a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**

**b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

The Howard County General Plan designates the area in which the Property is located as a "Residential Area" land use. Even with the revisions to the Second Amended Plan, Petitioner still requires variances to accommodate the use. Although the proposed use meets the minimum lot size and square footage requirement of the conditional use category, as reviewed in Part III, the Hearing Examiner finds that a 30-child Day Care Use is a much more intense use than adjoining residential uses. On a positive note, the Property's location on MD 99 could, potentially, accommodate the traffic associated with the use. However, several entrance improvements would be required.

Petitioner proposes to combine the use with the residential use of the Property. Because the required variances are denied, the Hearing Examiner necessarily concludes the overall intensity and scale of uses is inappropriate.

**B. Adverse Impacts.** Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

The assessment of a proposed conditional use under these criteria recognizes the potential for adverse impact from virtually every human activity. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the

question in the matter before me is not whether the proposed use would have adverse effects in an R-SC district. The proper question is whether those inherent adverse effects are greater at the proposed site than they would be generally elsewhere within the R-20 district. *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, the Petitioner has not met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a Day Care Use in the R-20 district.

**a. Physical Conditions.** The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The testimony and evidence indicate the proposed facility will generate inordinate noise from the use of the outdoor play area, which in the Hearing Examiner's view, is much larger relative to the entire site than the area generally approved for day care center conditional uses combined with a residential use.

**b. Structures and Landscaping.** The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

Based on the evidence and as heretofore discussed, the Hearing Examiner concludes the landscaping on the site will have a greater adverse impact on adjacent land and uses. The

hedges along the west lot line will not buffer the proposed outdoor use adequately, even with the privacy fence, given the intensity of the proposed Day Care Use.

**c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.**

Petitioner is proposing ten parking spaces, including two employee spaces and a van parking space. Owing to these spaces, residential and van parking would be located within the 20-foot use setback, as would the trash area and a portion of the circulation area. Petitioner testified that the driveway's location is intended to utilize the existing driveway. The Hearing Examiner is not persuaded that the proposed new landscaping along the east lot line will sufficiently screen the circulation area and parking spaces from adjoining residential uses.

**d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.**

The SHA recommends the petitions be denied until Petitioner demonstrates acceptable entrance improvements. The change in use will result in an increased trip generation potential, requiring the identification of peak hour trips to determine the extent of required entrance improvements such as acceleration, left turn, or bypass lands. The entrance location also violates spacing standards as it does not provide a 10-foot minimum between the beginning of the radius and the property line and does not incorporate the required channelization (curb and gutter).

Owing to these comments, the TSR makes no conclusion that the ingress and egress drive will provide safe access with adequate acceleration and deceleration lanes. The Hearing Examiner is likewise unable to evaluate whether the proposed use will provide safe access with adequate acceleration and deceleration lanes where appropriate.

**III. Specific Criteria for Child Day Care Centers and Nursery Schools, Day Treatment and Care Facilities (Section 131.N.13)**

- a. On-site circulation and parking areas shall be designed to minimize vehicular/pedestrian conflicts and to provide safe areas for dropping off and picking up passengers.**

The proposed parking area appears to be designed to minimize vehicular/pedestrian conflict, but the Hearing Examiner reaches a different conclusion with respect to the safety of the drop-off/pick up areas. As designed, the parking area appears to provide insufficient circulation area for vehicles to drop off or pick up 30 children. Some vehicles will maneuver to negotiate their exit even as other vehicles enter the site. Petitioner proposed no method by which to control/manage drop off/pick up times.<sup>3</sup>

- b. For child day care centers or nursery schools in industrial or commercial districts, outdoor play areas shall be fenced, screened and located to minimize exposure to noise and other emissions from roads, parking areas, and industrial activities.**

This section does not apply.

- c. The minimum lot size for child day care centers shall be 500 gross square feet of lot area per child.**

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<sup>3</sup> In contrast, the Hearing Examiner in Board of Appeals Case No. 04-053C granted a conditional use for a 15-child day care center on a 16,453 sq. ft. site subject to Petitioner's proposal to contract the pick-up and drop-off times with customers, such that no more than two vehicles will arrive at the Property within a 15-minute period.

No more than 30 children will attend the Day Care Use, resulting in a minimum lot size of 15,000-square feet. The Property is 21,954 square feet, in accordance with Section 131.N.13.c.

**d. Outdoor play areas or activity areas shall be fenced, located to the side or rear of the principal structure, and buffered from adjoining residential properties by landscaping or adequate distance or both.**

The outdoor play area will be fenced, located to the side and rear of the building, and are buffered by landscaping. This standard recognizes that the combination of landscaping and minimum use setbacks imposed by the zoning district may provide insufficient buffering, as the TSR remarks. In this case, the proposed outdoor play area hugs the 20-foot use setback. The Hearing Examiner concludes the proposed fencing and landscaping will provide an inadequate buffer for such a large play area.

**e. Parking areas shall be located and landscaped to minimize their visibility from roads and adjacent residential properties.**

The proposed parking areas for the Day Care Use (excepting the van parking within the setback) appears to be adequately located and landscaped to minimize their visibility from roads and adjacent residential properties.

**f. The design and massing of proposed structures or additions to existing structures shall be generally compatible in scale and character with residential properties in the vicinity of the site, as demonstrated by architectural elevations or renderings submitted with the petition. Additional setbacks from property lines and landscape buffering shall be required if necessary to make the appearance of the site compatible with surrounding residential properties.**

No additions or new structures are proposed. Section 131.N.13.f does not apply.

g. For facilities in residential districts with a capacity of more than 30 children or adult clients at one time, the following standards apply:

(1) The site has frontage on and direct access to a collector or arterial road designated in the General Plan, except that expansions of a conditional use that was approved prior to the effective date of Council Bill No. 11-2001 are permitted.

(2) Buildings, parking areas and outdoor activity areas will be at least 50 feet from adjoining residentially-zoned properties other than public road right-of-ways.

The Hearing Authority may reduce this setback to no less than 20 feet or the minimum setback required by the zoning district, whichever is greater, if:

(a) The adjoining land is committed to a long term institutional or open space use that provides an equivalent or better buffer for vicinal residential development; or (b) The petition includes detailed plans for screening, consisting of a combination of a solid fence or wall and landscaping, or an equivalent combination, that presents an attractive and effective buffer for neighboring residential properties.

(3) At least 20 percent of the area within the building envelope shall be green space, not used for buildings, parking area or driveways. The building envelope is formed by the required structure setbacks from property lines and public street rights-of-way.

Section 131.N.13.g does not apply.


**ORDER**

Based upon the foregoing, it is this **23<sup>rd</sup> day July 2012**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the requested variances from the 20-foot use setback up to ten feet for a playground and six feet for a concrete walk and bike path are **DISMISSED:**

It is **FURTHER ORDERED** that the petitions of Dana McGregor for a Day Care Child Center Conditional Use with up to 30 children, pursuant to Section 131.N.13 of the Howard County Zoning Regulations (the "Zoning Regulations"), and for variances to reduce the 20-foot use setback to two feet three inches for a van parking and trash can storage area, to ten feet for a shed and to seven feet for a parking circulation area, pursuant to Section 108.D.4.c.(2) are **DENIED.**

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



Michele L. LeFaivre

**Date Mailed:** \_\_\_\_\_

**Notice:** A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.